

(b) *Opposition to motion.* An opposition to a motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the party contends there exists a genuine dispute for hearing. The statement in opposition shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury or other evidence attached to the opposition, relied on to support the statement. The party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine dispute for hearing.

(c) *Time of filing.* Any party may file a motion for summary judgment no later than 5 days after the time limit for the completion of discovery set in the Board's acknowledgment order, or other time limit set by the adjudicating official. An opposition to a motion for summary judgment shall be filed within 15 days of service of the motion, or at the time specified by the adjudicating official.

(d) *Initiated by adjudicating official.* In addition to the authority set forth in 5 CFR 1201.41(b), if the adjudicating official determines on his or her own initiative that material facts may not be in genuine dispute, he or she may, after giving the parties written notice and at least 15 days to respond in writing, find that material facts are not in genuine dispute. The written notice to the parties shall include a statement separately listing all material facts as to which the adjudicating official believes there is no genuine dispute.

(e) *Decision by adjudicating official.* If, after considering the parties' submissions, the adjudicating official finds that material facts are not in genuine dispute, he or she must grant summary judgment on the law pursuant to 5 CFR 9701.706(k)(5) without conducting a hearing.

(f) *Definitions.* A fact is material if it is capable of affecting the outcome of the appeal. For a dispute to be genuine, there must be evidence sufficient for a reasonable person to find in favor of the nonmoving party.

**§ 1210.21 Initial decision by the adjudicating official.**

(a) *General.* The adjudicating official must issue a decision after the close of the record and a copy of the decision must be provided to each party to the appeal and to the Director. An initial decision must be issued no later than 90 days after the date on which the appeal is filed. However, failure to meet this deadline will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l). A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is the date on the Board's acknowledgment order, and the Board must issue an acknowledgment order within five calendar days after receiving the appeal. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission.

(b) *Consideration of penalty.* The adjudicating official may modify the penalty imposed by the Department if he or she determines that such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the adjudicating official's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(c) *Interim relief.* (1) If an employee is the prevailing party in an appeal under this subpart, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (b)(3) of this section. Such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department,

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subject to paragraph (b)(2) of this section, determines, in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee would be unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (b)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

### **Subpart C—Petitions for Review of Initial Decisions and Petitions for Reconsideration**

#### **§ 1210.30 Filing petition and cross petition for review.**

(a) *Who may file.* Any party to the proceeding or the Director may file a petition for review of the decision by the adjudicating official. The Director may request review when he or she believes that the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation or policy directive. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any petition for review must be filed within 30 days after receipt of the initial decision. Absent evidence to the contrary, the Board presumes that a decision delivered by regular mail is received by the addressee 5 days after its issuance. If regular mail is not delivered on the fifth day following the issuance of the decision, the presumed date of receipt is the next date on which mail is delivered. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross peti-

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tion. The Board may extend the filing period for good cause shown.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 5 CFR 1201.14.

(d) *Time for decision by the Board.* MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review as defined in 5 CFR 1201.114(i).

(e) *Effect of late decision.* The Board's failure to meet the requirement that decisions be rendered no later than 90 days after the close of the record will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(1).

#### **§ 1210.31 OPM petition for reconsideration.**

(a) If the Director seeks reconsideration of a final Board order, the Board must render its decision no later than 60 days after receipt of the opposition to the Director's petition in support of such reconsideration. The Board's failure to meet this requirement will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(1).

(b) The Board shall state the reasons for any decision rendered in response to a petition for reconsideration filed by the Director.

### **Subpart D—Review of Mandatory Removal Action Appeals**

#### **§ 1210.40 Filing a request for Board review.**

(a) *Who may file.* Any party to the proceeding or OPM may file a request for review. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any request for review must be filed within 15 days after issuance of the MRP's decision. Any